

1944

*Present: Moseley S.P.J. and Wijewardene J.*YOKKOMUTTU, Appellant, *and* SAMINATHAN, Respondent.*272—D. C. Point Pedro, 1,746.*

Alien enemy—Defendants in partition action—Action not suspended—Decree for sale in partition action—Proceeds of sale to be given in charge of Custodian of Enemy Property.

An action is not suspended merely because an alien enemy is a defendant.

There is no rule of law which prevents an alien enemy from appearing and conducting his defence.

Where, in a partition action, some of the defendants are alien enemies and a decree for sale is entered, the proceeds of sale to which such defendants would be entitled should be retained in Court pending such action by the Custodian of Enemy Property as he may think fit.

¹ 124 L. T. 327.

² 40 Times L. R. 541.

A PPEAL from a judgment of the District Judge of Point Pedro.

N. Nadarajah, K.C. (with him H. W. Thambiah), for the appellant.

L. A. Rajapakse (with him Arulambalam), for the respondent. .

Cur. adv. vult.

June 9, 1944. MOSELEY J.—

This is a partition action in which an order for sale of the land has been made. The third and fourth defendants have appealed against that order on the ground that the first and second defendants, who were, at the date of action brought, resident in Malaya, have not been properly served with the summons. On March 13, 1943, on the application of the plaintiff, it was ordered that service on the first and second defendants should be effected by service on the second defendant's mother who was alleged to be in possession of their share of the land. This was done, but no answer was filed on behalf of the first and second defendants. On June 24 there was a trial without contest and the order for sale was made.

It is now urged by the appellants that the decree should be set aside inasmuch as at all relevant times the first and second defendants were in the position of enemy aliens owing to the Japanese occupation of Malaya, and that the Custodian of Enemy Property is the proper person to be served with summons on their behalf. It is, I think, common ground that, apart from existing conditions, service on first and second defendants has been in compliance with section 3 of the Partition Ordinance (Cap. 55), and it is also conceded that these two defendants must be regarded as alien enemies for the purposes of the Defence Trading with the Enemy Regulations, 1939.

The right of an enemy alien to resort to the King's Courts was considered at length by the House of Lords in *SOVFRACHT (V/O) and VAN UDENS SCHEEPVAART EN AGENTUUR MAATSCHAPPIJ (N. V. GERR) 1943 A.C. 203* and it was held that no such right exists save by permission given by royal licence. The right of one of His Majesty's subjects to sue an enemy alien in our Court appears to be on a different footing. In *Robinson & Co. v. Continental Insurance Company of Mannheim*¹ Bailhache J. arrived at the conclusion that there is no rule of common law which suspends an action in which an alien enemy is defendant, and no rule of common law which prevents his appearing and conducting his defence. It should be added that the learned Judge foresaw the possibility of a difficulty if the defendant should succeed when the question of cost would arise. That, of course, is a position which presents itself in the present case where the first and second defendants, in spite of their position as such, stand to gain by the decree as it stands. Such a difficulty, Bailhache J. thought, would be met by suspending the defendant's right to issue execution.

It is necessary then to consider to what extent this common law right of an enemy alien to defend an action is affected by the Defence Trading with the Enemy Regulations, 1939. Under regulation 6A, it is provided that the Governor may, by order, *inter alia*, vest in the Custodian of

¹ (1915) 1 K. B. 155.

Enemy Property, such enemy property as may be prescribed. If such an order has been made in respect of the property in question there can be no doubt that the proper person to be served with summons in this case is the Custodian of Enemy Property. It has not been shown to us that such order has been made. In these circumstances I do not think there can be any objection to the manner in which service has actually been effected. It seems to me that the decree must be affirmed.

If the matter were to be allowed to rest there, it is conceivable that the share of the proceeds of the sale, to which the first and second defendants are entitled, might fall into enemy hands, and I think prosecutions should be taken on the lines suggested by Bailhache J. above. The District Judge is therefore directed to retain in Court any monies due to the first and second defendants and to serve the Custodian of Enemy Property with notice of the decree in order that he may take such steps as he may think proper and as are open to him to protect such monies until after the war.

The appeal is dismissed with costs.

WIJEYWARDENE J.—I agree.

Appeal dismissed.
